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DEPT OF TRANSPORTATION

VIA OVERNIGHT DELIVERY
U.S. Department of Transportation Dockets
Docket No. FAA-1998-4758 -56
400 Seventh Street SW
Room Plaza 401
Washington, DC 20590

Re: NPRM-November 23, 1998
14 CFR Part 129
Security Programs of Foreign Air Carriers

Dear Sirs:

Enclosed for filing please find in duplicate Comments of British Airway, PLC.

I would be most grateful if you would return the extra copy enclosed stamped "filed" in the enclosed self addressed envelope.

Thank you for your assistance.

Sincerely yours,

George N. Tompkins, Jr.

BEFORE THE

FEDERAL AVIATION ADMINISTRATION

WASHINGTON, D.C.

Security Programs of Foreign Air Carriers:	)	**Docket No. FAA-1998-4758** -56
	)	**Notice No. 98-17**
Proposed Rule	)	

COMMENTS OF BRITISH AIRWAYS, PLC

24 AM 10:3[illegible]

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May 24, 1999

I. POSITION OF BRITISH AIRWAYS ON SECURITY MEASURES

British Airways, PLC ("British Airways") fully supports the maintenance of high standards of civil aviation security throughout the world and can assure the Federal Aviation Administration ("FAA") of its continued dedication to and cooperation in achieving effective civil aviation security measures.

At the same time, however, British Airways is completely opposed to the unilateral extraterritorial application of any one nation's rules and regulations relating to civil aviation security. Consistent with the underlying principles of the Chicago Convention, as set forth in Article 11 thereof, British Airways complies with and in many cases exceeds the civil aviation security programs of each State to and from which British Airways operates. However, British Airways cannot and does not support or subscribe to any effort by the United States to impose unilaterally at airports outside of the United States the security programs and procedures imposed by the United States on United States air carriers at the same airports.

This is what the FAA is proposing to do by the amendment to § 129.25(e) of the Federal Aviation Regulations ("FARs") in this proceeding; and the FAA would do so without any finding that civil aviation security would thereby be enhanced. Further, the amendment proposed is of a FAR which by its very terms only "prescribes rules governing the operation within the United States of each foreign air carrier." 14 CFR § 129.1 (a). How can the FAA propose to amend a FAR to apply it extraterritorially when the very FAR itself as a whole applies to foreign air carriers only within the United States?

[1] Or by any Government for that matter.

Furthermore, British Airways is powerless to implement the proposed rule at any airport in the United Kingdom. This could be done only by the airport operator, BAA plc ("BAA").

British Airways urges the FAA to continue working to enhance civil aviation security with its counterpart organization in the United Kingdom, in the spirit of the principles of the Chicago Convention and the Air Services Agreement, and to abandon any unilateral effort to impose FAA civil aviation security regulations extraterritorially.

For the reasons that follow, and for the reasons set forth in the Separate Comments of British Airways, PLC Regarding Sensitive Security Information, filed simultaneously herewith, British Airways is opposed to the adoption of the proposed rule.

II. THE PROPOSED RULE

The FAA proposes to amend § 129.25(e)[2] of the FARs to provide that:

> a security program of a foreign air carrier is acceptable only if the Administrator finds that the security program requires the foreign air carrier in its operations to and from airports in the United States to adhere to the identical security measures that the Administrator requires U.S. air carriers serving the same airports to adhere to.

The stated purpose[3] of the proposed amendment is to implement the so-called Hatch Amendment to the Antiterrorism and Effective Death Penalty Act of 1996, which provides, in relevant part:

> The Administrator of the Federal Aviation Administration shall continue in effect the requirement of section 129.25 of title 14, Code of Federal Regulations, that a foreign air carrier must adopt and use a security program approved by the Administrator. The Administrator shall

[2] 14 CFR § 129.25(e).
[3] 63 FR 64764 (Nov. 23, 1998).

> not approve a security program of a foreign air carrier under section 129.25, or any successor regulation, unless the security program requires the foreign air carrier in its operations to and from airports in the United States to adhere to the identical security measures that the Administrator requires air carriers serving the same airports to adhere to.[4]

It is stated in the Notice of Proposed Rulemaking ("NPRM") that the proposed rule would apply to

> foreign air carrier operations at U.S. airports and at foreign airports that are a last point of departure before landing in the United States.'

The FAA appears to overlook completely or ignore the fact that FAR Part 129, by its very terms, applies to foreign air carriers ONLY WITHIN THE UNITED STATES. See, 14 CFR §129.1(a). How, therefore, can the FAA legally give extraterritorial application to the proposed amendment to Part 129.25(e)?

III. THE HATCH AMENDMENT DOES NOT AUTHORIZE THE EXTRATERRITORIAL APPLICATION OF THE PROPOSED RULE

The FAA purports to find the authority for the extraterritorial application of the proposed rule in the Hatch Amendment to the Antiterrorism Act. The Hatch Amendment directs the continuation of 14 CFR § 129.25, but not beyond the applicability of FAR Part 129 itself, which by its terms is limited in its application to the United States. 14 CFR § 129.1(a). While Congress specifically addressed Part 129.25 in the Hatch Amendment, Congress did not direct the amendment of Part 129 as a whole to extend it extraterritorially. The reference in the Hatch Amendment to Part 129.25 cannot be read to apply beyond the scope of Part 129.1 (a) which Congress left untouched.

[4] Pub. L. 104-132, Subtitle B, Sec. 322, 49 U.S.C. § 44906.
[5] 63 FR 64765 (Nov. 23, 1998).

The clear wording of the Hatch Amendment does not authorize the extraterritorial application of the proposed rule, particularly when it is read in conjunction with related provisions of the Federal Aviation Act,[6] FAR Part 129 itself, the Convention on International Civil Aviation ("Chicago Convention")' and, insofar as British Airways is involved, the Air Services Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Air Services ("Air Services Agreement").

The words "to and from airports in the United States", as used in the Hatch Amendment, cannot properly be read to include airports in another country. These words have no broader meaning than the words "upon entering or departing from" in Article 11 of the Chicago Convention, the words "admission or departure from" and "upon entrance into or departure from" in Article 4 of the Air Services Agreement, the words "entrance into, departure from" in Article 7 of the Air Services Agreement or, finally, the words "within the United States" used in 14 CFR § 129.1 (a).

No Party to the Chicago Convention or either Party to the Air Services Agreement has claimed to have the authority to impose unilaterally their aviation regulations, including aviation security regulations, at airports in the territory of another country. Yet, that is precisely what the FAA is now proposing to do as a result of this proceeding.

The FAA, in the NPRM, purports to recognize the limits of the applicability of Article 11 of the Chicago Convention and Articles 4 and 7 of the Air Services Agreement. In the face of this, it is difficult to comprehend how the FAA can view the proposed rule as being "in accordance with these international obligations." See, 63 FR 64766 (Nov. 23, 1998).

[6] 49 U.S.C. § 40101, *et* seq.
[7] 61 Stat. 1180; TIAS 1591; 15 UNTS 295 (1944).

The sparse "legislative history" of the Hatch Amendment gives no indication that the legislative intent was to authorize the FAA to unilaterally impose its aviation security regulations on foreign air carriers at airports which serve as last points of departure to the United States. ""In fact, the only example given in the Senate of how the Hatch Amendment was intended to operate was of two flights leaving from Cincinnati for Germany, one operated by a United States air carrier and one operated by a German air carrier. The Hatch Amendment was described as an attempt to have the identical FAA security measures *imposed at Cincinnati* on both the United States air carrier and the German air carrier. There is no mention, in the example given or in the stated objective of the Hatch Amendment, that the identical FAA security measures were to be applied to the United States air carrier and the German air carrier at the airport served in Germany. See, 141 Cong. Rec. S 7752-02 (June 5, 1995).

The stated objective of the Hatch Amendment and the FAA proposed rule is security enhancement. However, while this may be the stated objective, it would appear that cost competitive equality, as between United States air carriers and foreign air carriers, is also a prime objective of the Hatch Amendment and the proposed rule. One of the then supporters of the Hatch Amendment, Senator Larry Pressler of South Dakota, said that United States passenger air carriers "should not be put at a competitive disadvantage vis-a-vis foreign competitors whose relaxed security standards are less expensive." See, Aviation Daily, Vol. 320, No. 48, pg. 389 (June 8, 1995). British Airways certainly cannot be said to have "relaxed security standards" under any assessment. See, Separate Comments of British Airways, PLC Regarding Sensitive Security Information, filed simultaneously herewith.

At the Public Meeting herein on February 24, 1999, in response to a request for clarification from counsel for Scandinavian Airlines System (SAS) as to the scope of application of the proposed rule at airports outside of the United States, Cathal

Flynn, Associate Administrator for Civil Aviation Security, expressed his understanding of the intended scope of the application of the proposed rule in the following exchange:

> MR. GOLDMAN (counsel for SAS): . . . SAS seeks clarification from FAA whether the proposed rule, if finalized, would apply to more than just SAS's Stockholm flights, which is the only Scandinavian airport which currently receives U.S. carrier service.
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> * * * * * *
>
> ADM. FLYNN: If I may, in clarification of the point with regard to Copenhagen and Oslow (sic), the rule requires the foreign air carrier, in its operations to and from airports from the United States, to adhere to the identical security measures that the Administrator requires U.S. air carriers serving the same airports to adhere to. So if, as you say, Mr. Goldman, there is no service to, U.S. air service, at Copenhagen or Oslow (sic), then these identical measures provisions of this rule would not apply, at those airports.*

QUERY: If the Copenhagen and Oslo airports serve "as the last points of departure to the United States" for SAS, and if the objective of the Hatch Amendment and the FAA proposed rule truly is to enhance aviation security in transportation to and from the United States, how can this objective be achieved when the proposed rule would not even apply to SAS at the Copenhagen and Oslo airports, simply because no United States air carrier presently utilizes those airports "as last points of departure to the United States"?

The United States has no legally recognized authority to impose security rules or regulations at airports in the sovereign territory of another nation, i.e., extraterritorially, without the express agreement of the foreign sovereign involved. The United Kingdom has not agreed to the proposed rule being applied to United Kingdom air carriers at airports in the United Kingdom. Indeed, the United Kingdom vigorously and "at the highest political level" protests the action proposed by the FAA.[9] See, Comments of United Kingdom Government filed herein.

[9] Transcript of Public Meeting, February 24, 1999, at page 110.
Transcript of Public Meeting, February 24, 1999, at pages 9-16.

IV. THE PROPOSED RULE, IF ADOPTED AND IMPLEMENTED, WOULD VIOLATE THE CHICAGO CONVENTION, THE AIR SERVICES AGREEMENT AND THE FEDERAL AVIATION ACT.

A. The Chicago Convention

Whether read as a whole or in separate articles, there is nothing in the Chicago Convention that authorizes one nation to apply its civil aviation security regulations in the territory of another nation, i.e., extraterritorially.

The basic principle of the Chicago Convention is the clear recognition that "every State has complete and exclusive sovereignty over the airspace above its territory,"[10] that the aircraft of one State shall comply with the laws and regulations of another State "upon entering or departing from or while within the territory of that other State,"[11] and that each State commits to cooperation in establishing uniform "international standards and recommended practices and procedures . . . concerned with the safety regularity and efficiency of air navigation.. . ."[12]

Article 11 of the Chicago Convention reads:

> Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State.

Article 11 is a clear recognition that the laws of a Contracting State apply to the aircraft of another State only while such aircraft are within the territory of the other State and upon entering or departing from that State.

[10] Chicago Convention, Article 1.
[11] Chicago Convention, Article 11.
[12] Chicago Convention, Article 37.

No State, Party to the Chicago Convention, in the 55 years of its existence, has claimed to the contrary.

Each Party to the Chicago Convention undertakes, in the spirit of international cooperation that is the cornerstone of the Convention, to collaborate in securing the highest practicable degree of uniformity in regulations governing international air transportation and to follow the international standards and recommended practices adopted by the International Civil Aviation Organization ("ICAO"). Chicago Convention, Article 37. [13]

Annex 17 to the Chicago Convention sets forth the International Standards and Recommended Procedure for aviation security. The basic principle of Annex 17 is that each State should have in place and in effect and carry out within its territory and at its airports security measures and procedures consistent with the standards and procedures agreed in Annex 17. [14] Nowhere in Annex 17 is there any recognition that one State may unilaterally impose its aviation security program, measures or procedures, at airports in another State.

International cooperation and not unilateral dictation in aviation security programs and measures is at the foundation of Annex 17. Thus, Article 3.2.1 reads:

> Each Contracting State shall co-operate with other States in order to adapt their respective national civil aviation security programmes as necessary.

And, where one State desires special security measures to be taken by operators of aircraft of other States, the State so desiring must request the other State to take such measures. Thus, Section 3.2.2 of Annex 17 provides:

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[13] As recently as September 22, 1998, at the ICAO General Assembly in Montreal, Canada, FAA Administrator Garvey reaffirmed the commitment of the United States to the principles of the Chicago Convention and the belief of the United States "that the only global forum for debate on standards affecting international civil aviation is ICAO." Further, Administrator Garvey strongly urged "each Contracting State to work within the ICAO mechanism . . . and to honor current ICAO standards in the process."

[14] See, e.g., Sections 2.1.3, 2.2.1, 3.1.2, 3.1.3, 3.1.5, 4.1.3, 4.2.2, 4.2.5, 4.3.1 and 4.5 of Annex 17.

> Each Contracting State shall ensure that requests from other States for special security measures in respect of a specific flight or specified flights by operators of such other States, as far as may be practicable, are met.

It was obviously pursuant to this principle that the United States requested permission from the United Kingdom to implement special security measures for United States air carriers operating from London's Heathrow and Gatwick airports to the United States. Consistent with the spirit and principles of the Chicago Convention and Annex 17, the permission of the United Kingdom was granted.

The unilateral extraterritorial application of FAA security regulations, to non-US air carriers at non-US airports, would undermine the principles and arrangements expressed in the Chicago Convention. The statement in the NPRM that the "proposed rule would be consistent with U.S. international obligations" and that the "provisions of the proposed rule are within the scope of the laws and regulations governing admission or departure from the United States" recognized in the Chicago Convention, is in direct conflict with the clear wording of the Chicago Convention, the spirit of international cooperation underlying the principles and arrangements agreed in the Chicago Convention and, finally, the recognition and agreement in the Convention that one State's rules and regulations governing international civil aviation are applicable only within that State. Nowhere in the NPRM does the FAA even attempt to justify this statement other than by simply stating it. Simply saying so does not make it so.

ICAO has expressed to the FAA its deep concern "about the extraterritorial aspects" of the Hatch Amendment and the FAA proposed rule implementing the Amendment. See, Transcript of Public Meeting, February 24, 1999, at page 35. Further, the Council of ICAO adopted a Resolution on February 5, 1999, objecting strongly to the implementation of the Hatch Amendment by the proposed amendment of § 129.25(e) of the FARs. The Resolution states, in part:

1. The Council decides that the Hatch Amendment and the proposed amendment to [§ 129.25(e) of the FARs] infringe basic principles of the Chicago Convention.. .

2. The Council Expresses its deep concern about the extraterritorial aspects of the Hatch Amendment and the proposed amendment to the Regulations. . .

Transcript of Public Meeting, February 24, 1999, at pages 40-4 1.

When the FAA was considering the amendment to Part 129.25(e) in 1991, to require foreign air carriers to maintain security programs having a "similar level of protection" to United States air carriers, the FAA rejected any notion of "identical" measures being imposed unilaterally on foreign air carriers at foreign airports, stating:

> It is not always possible or appropriate to unilaterally impose identical security procedures for U.S. air carriers and foreign air carriers, because the perceived -- and often the actual -- threat directed at the air carriers of various nations differs widely. An attempt to require all air carriers, foreign and domestic, to follow identical procedures could precipitate major economic and political confrontations with little or no increase in passenger security. Bilateral negotiations will be used, when necessary, to preclude such confrontations and increase the level of aviation security. The Secretaries of State and Transportation are committed to both multilateral and bilateral actions to improve and strengthen security standards.

56 FR 4329 (Feb. 4, 1991).

Even when the FAA proposed to have "equivalent procedures" at foreign airports, the FAA recognized the necessity to do so in consultation with the foreign governments involved; and not by unilateral dictation:

> The threat to air carriers from different countries varies widely and may change at any time at any airport. Rigid application of identical security procedures at all airports may not necessarily improve the security posture of each foreign air carrier and would impose a burden not reasonably related to the threat. The FAA will require, in consultation with foreign governments, equivalent procedures at airports where the Administrator has determined that such procedures are necessary to provide passengers a similar level of protection.

56 FR 30126 (July 1, 1991).

The adoption of the proposed rule would put at risk the legal foundation of the Chicago Convention, which has served for 55 years as the basis for the development of international civil aviation, and the international cooperation against the terrorist threat to international civil aviation whichexists today.

The FAA, as the organization responsible for the aviation security program of the United States within the contemplation of the Chicago Convention'j, is urged to re-examine the scope of the proposed amendment to §129.25(e) of the FARs in light of the obligations of the United States in the Chicago Convention, including Annex 17, and to accept that the FAA cannot, consistent with these obligations, adopt and implement such a rule.

B. The Air Services Agreement

The Air Services Agreement between the United States and the United Kingdom is a by-product of the Chicago Convention. The preamble to the Air Services Agreement reasserts the commitments of the United States and the United Kingdom to the principles of the Chicago Convention.

Article 4 of the Air Services Agreement sets forth the agreement of the Contracting Parties as to the "Applications of Laws." Article 4 reads:

> (1) The laws and regulations of one Contracting Party relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of the airline or airlines designated by the other Contracting Party and shall be complied with by such aircraft upon entrance into or departure from and while within the territory of the first Contracting Party.
>
> (2) The laws and regulations of one Contracting Party relating to the admission to or departure from its territory of passengers, crew, cargo or mail of aircraft, including regulations relating to entry, clearance, immigration, passports, customs and quarantine, shall be complied with by or on behalf of such passengers, crew, cargo or mail of

[15] See, Annex 17, section 2.1.3.

> the airlines of the other Contracting Party upon entrance into or departure from and while within the territory of the first Contracting Party.

Article 4 of the Air Services Agreement, like Article 11 of the Chicago Convention, is a clear recognition that the laws and regulations of the United States apply to aircraft of the United Kingdom while arriving at or departing from airports *in the United States* or while within the territory of the United States'! This is the same recognition embodied in Article 11 of the Chicago Convention. Neither Article 4 of the Air Services Agreement nor Article 11 of the Chicago Convention authorizes, recognizes or implies that the laws and regulations of one State may be applied unilaterally to aircraft of another State in the territory of that other State. In the NPRM, however, the FAA says just the opposite and takes the position that the proposed rule and its implementation are "in accordance with these international obligations" of the United States with the United Kingdom. The Government of the United Kingdom, however, disagrees quite strongly with this unilateral position of the FAA. See, Transcript of Public Meeting, February 24, 1999, at page 10. See *also,* Comments of United Kingdom Government filed herein, and in particular paragraphs 1, 3, and 6 and 16(iv) thereof.

Aviation Security is the subject of Article 7 of the Air Services Agreement. Every provision of Article 7 recognizes and reaffirms that aviation security is the responsibility of each Contracting Party *within its territory.* Article 7(3) of the Air Services Agreement recommits the Parties to the aviation security standards and recommended practices established by ICAO. The Air Services Agreement also commits the Parties to require *their respective aircraft operators* to "act in conformity with such aviation security provisions." Nowhere in the Air Services Agreement is there any

[16] If Article 4 of the Air Services Agreement authorizes the regulatory authority of either party to impose its rules and regulations on the air carriers of the other Party in the territory of that other Party, as the FAA says it does, then why does the Air Services Agreement even have a provision relating specifically to the responsibility of each Contracting Party for aviation security within its territory? See Article 7 of the Air Services Agreement, discussed *infra.*.

recognition of or agreement that one Party can require conformity with its aviation security provisions by aircraft operators of the other Party at an airport within the territory of that other Party. In fact, the United States presently is seeking an amendment to the Air Services Agreement to permit what the FAA says in this proceeding it can do unilaterally. See, Comments of Government of United Kingdom filed herein, paragraph 3.

Article 7(4) of the Air Services Agreement recognizes the spirit of mutual cooperation where special security measures, to meet a particular threat, are desired by one Party or the other. Article 7(4) obligates each Contracting Party to act favorably upon any request of the other Contracting Party for reasonable security measures. Indeed, it was pursuant to this very provision of the Air Services Agreement and Annex 17 of the Chicago Convention that the United Kingdom acted favorably upon the request of the United States for special security measures to be applied by United States air carriers operating from airports in the United Kingdom to airports in the United States.

The adoption and implementation of the proposed rule, as to British Airways, would be contrary to the obligations of the United States in the Air Services Agreement. Insofar as the United States may deem otherwise, it is incumbent upon the United States to seek consultations on the issue with the United Kingdom pursuant to Article 16 of the Air Services Agreement and, where these consultations do not resolve the issue, the provisions of Article 17 for the Settlement of Disputes must be followed.

C. *The Federal Aviation Act*

In carrying out her duties and responsibilities under the Federal Aviation Act, the Administrator of the FAA is mandated to act consistently with the obligations of the United States Government under an international agreement. 49 U.S.C. §40 105(b)(l)(A).

The extraterritorial application of the rule proposed by the FAA in this proceeding, in view of the obligations of the United States under the Chicago Convention and the Air Services Agreement, would be in direct contravention of the duties and responsibilities of the Secretary of Transportation and the Administrator set forth in the Federal Aviation Act.

There has been no assessment by the Secretary of Transportation that the security measures in effect at any airport in the United Kingdom are not at least in conformity with Annex 17 of the Chicago Convention. See, 49 U.S.C. §44907(a)(2).

There has been no notification to the appropriate authorities in the United Kingdom that the security measures in place at any airport in the United Kingdom are deficient in any respect. See, 49 U.S.C. §44907(c).

The Federal Aviation Act authorizes only the President to extend the application of the Act to outside the United States and then, only under limited and specific circumstances, when

> (1) an international arrangement gives the United States Government authority to make the extension; and
>
> (2) the President decides the extension is in the national interest.

49 U.S.C. §40120(b)

The President has not sought to extend the security regulations of the FAA or the Federal Aviation Act itself to airports outside of the United States. There is no international arrangement that gives the United States Government the authority to make

the extension. The President has made no determination that such an extension "is in the national interest."

Even when it is deemed necessary to extend the application of the Federal Aviation Act to "those areas of land or water outside the United States and the overlying airspace thereof over or in which the Federal Government of the United States, under international treaty, agreement or other lawful arrangement, has appropriate jurisdiction or control," an Executive Order was required. See, Executive Order No. 10854, 24 FR **9565** (Dec.1, 1959).

There has been no comparable action by the President in respect of the extension of the Federal Aviation Act to anywhere outside of the United States so as to implement the Hatch Amendment.

The proposed rule to implement the Hatch Amendment would usurp the authority of the President, would be *ultra vires* and, therefore, unauthorized by law.

V. THE HATCH AMENDMENT CANNOT PROPERLY BE READ TO SUPERCEDE THE OBLIGATIONS OF THE UNITED STATES IN THE CHICAGO CONVENTION AND IN THE AIR SERVICES AGREEMENT

Insofar as the Hatch Amendment may be read to authorize the FAA to apply its aviation security regulations extraterritorially, as is proposed in this proceeding, the Amendment would be in direct conflict with the obligations of the United States in the Chicago Convention and the Air Services Agreement. There is nothing in the Hatch Amendment or its history that reflects a congressional intent to authorize the FAA to act in a manner inconsistent with the obligations of the United States in the Chicago Convention and the Air Services Agreement.

The Hatch Amendment and its sparse history make no reference to the Chicago Convention or the numerous air services agreements to which the United States is a Contracting Party. Legislative silence cannot suffice to override the commitments

of the United States undertaken in a treaty. Weinberger v. Rossi, 456 U.S. 25, 32 (1982). Further, it would be improper to ascribe to the Congress an intent to act contrary to the international agreements of the United States without an explicit and unambiguous statement from Congress to that effect. Menominee Tribe of Indians v. United States, 391 U.S. 404, 412-13 (1968).

While it is accepted that treaties may be modified by subsequent Acts of Congress or other executive agreements, Moser v. United States, 341 U.S. 41, 45 (1951), there is a firm and sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action. Trans World Airlines, Inc v. Franklin Mint Corp., 466 U.S.243, 252 (1984). The Hatch Amendment, at best, is an ambiguous congressional action, if it is relied upon as the legislative basis for the FAA to impose its aviation security regulations on foreign air carriers outside of the United States. The Hatch Amendment cannot be read as a congressional abrogation or modification of the obligations of the United States in the Chicago Convention or the Air Services Agreement.

> A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.

Cook v. United States, 288 U.S. 102, 120 (1933).

The FAA should reflect upon the grave consequences that would follow, not only in the area of civil aviation security regulation but throughout international civil air transport regulation, if the FAA proceeds as proposed. See, Comments of United Kingdom Government filed herein, paragraph 24.

VI. THE IMPLEMENTATION OF THE HATCH AMENDMENT WOULD RESULT IN SUBSTANTIAL ANNUAL REVENUE LOSSES TO BRITISH AIRWAYS AND CORRESPONDINGLY TO UNITED STATES AIR CARRIERS SERVING THE SAME AIRPORTS IN THE UNITED KINGDOM

The inevitable c&sequence of the implementation of the Hatch Amendment at Heathrow's London and Gatwick Airports would be inefficient use of infrastructure leading to operational restrictions on the use of the capacity available. The immediate impact would be economic, through additional operational costs and reduced revenue earning capability.

The major operator of airports in the United Kingdom, BAA, has stated that the impact would be shared by all carriers offering transatlantic service, including United States air carriers. The traveling public would be adversely affected, as reduced capacity would inevitably place limits on seat access and the availability of lower fares.

The loss of revenue estimates (expressed as a range) to British Airways are based on:

i) A reduction in transfer revenues as a direct consequence of longer minimum connection times (MCT) to United States departures as a result of the proposed rule.

ii) A reduction in network revenues reflecting redistribution of capacity between large and small aircraft and from long-haul to short-haul departures.

Operational costs would increase and revenue losses would result due to the following factors:

1. Additional security costs would be incurred by British Airways as a result of implementing the Hatch Amendment. See the Separate

Comments of British Airways, PLC Regarding Sensitive Security Information, filed with the Office of Civil Aviation Security Operations in Docket No. FAA-1998-4758.

2. A reduction in transfer revenue resulting from increased MCTs to United States departures. This is estimated at **£16 million per annum,** based on an increase of 15 minutes in the MCT. See Appendix 1 filed with the Separate Comments of British Airways, PLC Regarding Sensitive Security Information.

3. A reduction in per flight revenue resulting from either the substitution of a smaller aircraft or a change from longhaul to shorthaul service, both having lower revenue generating capability. This is estimated at between **£620 million and £814 million per annum,** based on a redistribution of approximately 13 daily services at Heathrow and Gatwick. See Appendix 2 filed with the Separate Comments of British Airways, PLC Regarding Sensitive Security Information..

On this basis, British Airways calculates that, until adequate infrastructure could be re-provided, implementation of the Hatch Amendment by the proposed rule would result in revenue losses to British Airways at Heathrow and Gatwick airports of **between £636 million and £830 million per annum in the short and medium term.** As the submission of the Government of the United Kingdom (DETR) makes clear, comparable revenue losses would be incurred by all carriers serving the United States from Heathrow and Gatwick, including United States air carriers.

British Airways and BAA agree that the ultimate capacity of Heathrow and Gatwick airports would be limited by the processing capability of the terminal infrastructure, even without the proposed rule. The proposed rule would worsen airport efficiency as use of available runways will be limited by the lack of terminal capacity.

In summary, therefore, and without any evidence or showing that the proposed rule would in fact result in enhanced security effectiveness:

1. The inevitable consequence of implementation of the proposed rule at United Kingdom Airports will be to increase operational costs and limit capacity available.

2. In the short to medium term, air carriers will protect their slot portfolio by reducing aircraft size and/or redistributing departures from long haul (including transatlantic) to shorthaul service.

3. Airline revenues will be reduced dramatically.

4. Capacity, seat access and the availability of lower fares on transatlantic routes will be restricted.

5. In the long term, airport authorities will be expected to re-provide airport facility to recapture lost capacity. This will be costly, will take many years to deliver and will reduce the ultimate capacity of the constrained airport system.

6. All carriers operating transatlantic service, including United States air carriers, will face the same capacity restrictions and comparable revenue losses.

7. **British Airways anticipates revenue losses to itself in excess of £600million per annum in the event that the proposed rule is implemented.**

VII. CONCLUSION

The proposed amendment to §129.25(e) of the FARs, to implement the Hatch Amendment to the Antiterrorism Act of 1996, should be withdrawn.

May 24, 1999

Respectfully submitted,

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- and -

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